Filed 9/15/04 Certified for publication 10/5/04 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re CHRISTOPHER W., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. R.W. et al, Defendants and Appellants.	E035622 (Super.Ct.No. RIJ102896) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert W. Nagby, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant R.W.

Frank O. Tetley, under appointment by the Court of Appeal, for Defendant and Appellant B.S.

William C. Katzenstein, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Minor.

R.W. (the father) and B.S. (the mother) appeal from an order terminating their parental rights to their one-year-old son, Christopher W.

Both parents contend the juvenile court erred by proceeding in the absence of notice pursuant to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). In addition, the mother contends the juvenile court erred by refusing to find that the parental relationship exception to termination of parental rights applied. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).) We find no error. Hence, we will affirm.

I

COMPLIANCE WITH ICWA

A. *Additional Factual and Procedural Background*.

In the detention hearing report, submitted on or about January 29, 2003, the social worker stated: "[The father] reported that his great[-]great[-]grandmother[] was Cherokee Indian. He is not a member of the tribe. [¶] . . . C[hild] W[elfare] S[ervices] records indicated that the mother does not have Native American [h]eritage." She added that she had given telephonic notice of the detention hearing to "Indian Child Welfare."

On January 31, 2003, at the detention hearing, the juvenile court ordered: "DPSS to give notice to tribes." (Capitalization omitted.)

In the jurisdictional/dispositional report, submitted on or about February 20, 2003, the social worker stated: "The mother has indicated, during a previous dependency case[,] that she is not of Indian heritage. [The father] reported to the previous social worker that his great[-]great[-]grandmother[] was Cherokee Indian. He is not a member

of the tribe and did not provide any further information. [¶] . . . Further information is required from [the father] in order to determine his Indian heritage and eligibility. Efforts will continue to be made to meet with [the father] to obtain the necessary information." That particular social worker, however, made no such efforts.

In April 2003, the case was reassigned to social worker Orisco Wilson. On June 12, 2003, during a supervised visit, Wilson talked to both parents about a variety of matters, including "need[ing] relatives[']names, DOB, tribes of relatives with Indian heritage . . . ."

On June 17, 2003, in a telephone call, Wilson told the father, among other things, that he "needed information on family members [--] name [and] DOB [--] for Indian heritage." The father said he would call back with that information later that week.

On July 17, 2003, Wilson left a phone message for the parents, reminding them that he still needed "info[] regarding . . . Indian lineage . . . ."

On July 29, 2003, Wilson mailed the parents a "reminder about needing info on Indian heritage . . . ."

In the six-month review report, submitted on or about August 12, 2003, Wilson stated: "[T]his writer asked the parents about their Indian heritage. [The mother] stated she thought there was some lineage in her family but as of this date, she has not provided the Department with information. [The father] stated he thought there was family lineage, but as of this date, he has not provided the Department with information."

In the report for the hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26 hearing), submitted on or about January 12, 2004, a different social worker stated: "The mother has indicated, during a previous dependency case[,]

that she is not of Indian heritage. [The father] reported to the previous social worker that his great[-]great[-]grandmother was Cherokee Indian. He is not a member of the tribe and did not provide any further information." The social worker concluded, "The Indian Child Welfare Act does not apply."

B. *Analysis*.

"'The stated purpose of the ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster care or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." [Citation.]' [Citation.]" (*In re Suzanna L*. (2002) 104 Cal.App.4th 223, 229 [Fourth Dist., Div. Two], quoting *In re Santos Y*. (2001) 92 Cal.App.4th 1274, 1299.)

The significant provision of the ICWA for our purposes is the notice provision. (25 U.S.C. § 1912(a).) It states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to . . . the tribe. No foster care placement or termination of parental rights proceeding shall

be held until at least ten days after receipt of notice by . . . the tribe or the Secretary . . . ." (*Ibid*.; see also 25 U.S.C. § 1903(11).)

Rule 1439 of the California Rules of Court (rule 1439) is designed to ensure compliance with the ICWA. It provides that "if . . . the court has reason to know the child may be an Indian child, the court shall proceed as if the child is an Indian child . . . ." (Rule 1439(e).) It further provides that the court has reason to know the child may be an Indian child if, among other things, "[a] party . . . informs the court or the welfare agency or provides information suggesting that the child is an Indian child . . . ." (Rule 1439(d)(2)(A).)

The ICWA defines an "Indian child" as a child who is either (1) "a member of an Indian tribe" or (2) "eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).) Conversely, if the child is not a tribe member, and the mother and the biological father are not tribe members, the child simply is not an Indian child.

Nevertheless, the courts of this state have held that a duty to give notice can arise even in the absence of evidence that the child or a parent is a tribe member. (See *In re Antoinette S*. (2002) 104 Cal.App.4th 1401, 1406-1407; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254; *In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1425.) Their reasoning is essentially twofold. First, a parent legitimately may not know if he or she is a tribe member. (*Dwayne P.*, at p. 257; *In re Kahlen W*., at p. 1425) "'Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. [Citation.]' [Citation.]" (*Dwayne P.*, at p. 255, quoting *In re Santos Y*., *supra*, 92 Cal.App.4th at p. 1300.) Second, each tribe has the

sole authority to determine its own membership. (Rule 1439(g); *Dwayne P.*, at p. 255.) Indeed, one of the purposes of giving notice is to allow the tribe to determine whether the child is, in fact, an Indian child. (*Dwayne P.*, at pp. 254-255.) Thus, there is a concern lest the trial court usurp the tribe's authority.

Here, however, the father affirmatively stated that he was not a member of any Indian tribe. This went beyond a mere lack of evidence of membership; it disproved membership. Despite the countervailing concerns we have noted, at some point one simply has to take a parent's word for these things. After all, if a parent says he or she has no Indian ancestry, that is usually the end of the matter. A statement that he or she is not a tribe member should be equally conclusive. Accordingly, in light of the whole record, the father's statement that his great-great-grandmother had been a Cherokee Indian did not give the trial court reason to think Christopher was an Indian child.

The mother's statements likewise gave the trial court no reason to think Christopher was an Indian child, although for a slightly different reason. While a child's Indian status need not be certain to trigger the ICWA's notice requirements, vague speculation does not suffice. Under rule 1439, there is a duty to give notice if a party "provides information suggesting that the child is an Indian child . . . ." (Rule 1439(d)(2)(A).) Notably, it does not say "suggests"; it says "provides *information* suggesting . . . ." This implies that some minimal level of informative content, beyond a bare suggestion, is required.

For example, in *In re O.K.* (2003) 106 Cal.App.4th 152, the father's mother told the trial court that the father "may have Indian in him. I don't know my family history that much, but where were [*sic*] from it is that section so I don't know about checking

that." (*Id*. at p. 155.) The court of appeal held that this was "insufficient to give the court reason to believe that the minors might be Indian children. The information . . . was not based on any known Indian ancestors but on the nebulous assertion that 'where were [*sic*] from is that section . . . .' This information was too vague and speculative . . . ." (*Id*. at p. 157.) "The other cases relied on by appellants are distinguishable in that they involved information that a parent, or an immediate relative of the minor, was a member or might be eligible for membership in a tribe. [Citations.]" (*Ibid*.) "[I]t was not the paternal grandmother's failure to specify a tribal affiliation that rendered the information insufficient but her failure to assert *any information that would reasonably suggest* that the minors had any known Indian heritage." (*Id*. at p. 158, italics added.)

Here, the mother merely said that "she thought there was some lineage in her family . . . ." However, she never responded to Wilson's repeated requests for more information. Moreover, she was impeached by her statement in a previous dependency that she did not have any Indian heritage. There was no reason to think her statement was based on any known Indian ancestor or, indeed, on anything at all. The trial court had no principled way to prefer her statement that she might have Indian heritage over her statement that she did not.

We conclude that the trial court had no reason to know that Christopher was or even might be an Indian child within the meaning of the ICWA. Accordingly, it could properly proceed even though no notice had been given (directly or through the Secretary of the Interior) to any Indian tribes.

II

THE PARENTAL RELATIONSHIP EXCEPTION

The mother also contends the juvenile court erred by failing to find that the parental relationship exception applied. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).) This "may be the most unsuccessfully litigated issue in the history of law. . . . And it is almost always a loser." (*In re Eileen A*. (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S*. (2003) 31 Cal.4th 396, 413.) It fares as usual here.

A. *Additional Factual and Procedural Background*.

The only evidence before the juvenile court at the section 366.26 hearing was the section 366.26 hearing report. It stated that the mother had failed to complete her reunification services plan, in part due to missed drug tests and unsatisfactory drug test results.

The parents had been allowed supervised visitation every week for two hours. Their visitation had been fairly regular; there had been more than the usual number of cancellations, but only for the usual reasons -- a parent was sick or had car trouble, Christopher was sick, a social worker was unavailable to supervise, etc.

The report also stated that Christopher had been with the prospective adoptive father since he was six weeks old and "continues to do well in his adoptive placement. The foster father is able to care for all of Christopher's medical, psychological and emotional needs. . . . [¶] It appears that there is a strong bond between Christopher and the foster father. Christopher has been observed clinging to the foster father when he does not recognize a familiar face. Christopher always looks up at the foster father when

he hears his voice. . . . The foster father stated he is committed to adopting Christopher and providing him with a safe and stable home."

B. *Analysis*.

In general, at the section 366.26 hearing, if the court finds that the child is adoptable, it must select adoption as the permanent plan; to that end, it must terminate parental rights. (Welf. & Inst. Code, § 366.26, subds. (b)(1), (c)(1).) This rule, however, is subject to five statutory exceptions. (Welf. & Inst. Code, § 366.26, subds. (c)(1)(A)-(c)(1)(E).) The only one relevant here is the "parental relationship" exception. It applies when "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subds. (c)(1)(A).)

"We have interpreted the phrase 'benefit from continuing the relationship' to refer to a 'parent-child' relationship that 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' [Citations.]" (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

"[T]he parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some

incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954, quoting *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The burden of proving that the exception applies is on the parent. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.)

We need not be overly concerned about the appropriate standard of review. (Compare *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 425 [substantial evidence test] with *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [abuse of discretion].) There was simply no evidence that the mother played a parental role in Christopher's life. No reasonable trier of fact could have found that her relationship with him promoted his well-being to such an extent as to outweigh the well-being he would gain from a permanent home with the foster father. And there was no evidence that severing their relationship would harm Christopher at all, much less greatly.

There was absolutely no evidence concerning the quality of the mother's visits (except for the isolated comment that one particular visit "went well"). The mother relies on the six-month review report. That report, however, was not introduced into evidence at the section 366.26 hearing. In any event, all it showed was that, during visits, the mother was "loving and affectionate," "appropriate," and "nurturing." She fed Christopher, burped him, cleaned his face when he spit up, changed his diaper, and "s[a]ng and read[] to him to make him laugh." This is no more than a conscientious

babysitter would do. It did not show that Christopher so much as recognized her, let alone had a relationship with her.

The mother also argues that the prospective adoptive father was "a single male who was out of town for extended periods of time, leaving Christopher in child care . . . ." The evidence before the trial court demonstrated that being single did not impair his ability to be a parent to Christopher. It did show that Christopher was in child care, but this would be necessary if the prospective adoptive father was to work. Also, the prospective adoptive father did go out of town once, leaving Christopher with his usual child care provider, but there is no evidence of how long he was gone. The mother relies again on earlier reports that were not before the trial court. Also, these merely showed that the prospective adoptive father had gone out of state once *with Christopher*, to visit his family.

We conclude that the juvenile court did not err by declining to find that the parental relationship exception applied.

III

DISPOSITION

The order appealed from is affirmed.

RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.

Filed 10/5/04

CERTIFIED FOR PUBLICATION

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH DISTRICT

DIVISION TWO

ORDER

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THE COURT

A request having been made to this Court pursuant to California Rules of Court, rule 976(a), for publication of a nonpublished opinion heretofore filedin the above-entitled matter on September 15, 2004, and it appearing that the opinion meets the standard for publication as specified in California Rules of Court, rule 976(b),

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 976(b).

CERTIFIED FOR PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.